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Ian Paget-Brown

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The purpose of this Article is to examine the development of "bank secrecy" in the Cayman Islands, and to show the efforts made by the Cayman Islands Government to preserve the integrity of its financial industry.

The Cayman Islands, a British colony, lie one hour's jet flight from Miami, Florida, and 180 miles west-northwest of Jamaica. The country is free from all forms of direct taxation and currency restrictions.[1] Its modern laws are designed to attract international business and impose the minimum of regulatory control.

The faith which the international business community has reposed in the Cayman Islands as a major financial center is reflected by the economic growth of the Islands. With a population of only 23,400, the Cayman Islands Government revenue rose to exceed U.S. $100 million in 1987 from about U.S. $4 million in 1970.[2] Although tourism is the country's biggest economic contributor, the financial industry plays an extremely important role. In 1966 there were 17 banks licensed on the Island; today there are more than 500, including representatives of 80% of the world's 50 largest banks.[3] Over 16,000 companies are incorporated in the Cayman Islands; as at the 1987 year end approximately 360 are engaged in international insurance business.[4] As the Cayman Islands former Financial Secretary Vassel Johnson C.B.E., J.P. said:

> The value to the Cayman Islands of the financial industry is far more than the sum total of its institutions, the services offered and the income to the country. The most valuable asset is the confidence of the international financial community. We must therefore do everything to protect our good name and build on it.[5]

The Cayman Islands Government enacted the Confidential Rela-

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1 I. PAGET-BROWN, COMMERCIAL LAW OF THE CAYMAN ISLANDS 1 (2d ed. 1985).

2 Interview with Jim Graves, Cayman Islands Government Information Service, Cayman Islands, June 3, 1988.

3 *Id.*

4 *Id.*

5 Address by the Honorable V.G. Johnson, C.B.E., J.P., Financial Secretary, 1981 Budget.

tionships (Preservation) Law[6] as a result of U.S. Internal Revenue Service (I.R.S.) agents' activities while seeking information concerning bank accounts of U.S. citizens in tax havens. It was discovered in 1975 that I.R.S. agents had bribed a Bahamian immigration officer. Soon after that it was reported that I.R.S. agents had broken into the Miami apartment of a Bahamian bank manager while he was distracted by a female escort provided by the I.R.S., removed his briefcase and photocopied the documents inside.[7]

Following these incidents, on January 12, 1976, Anthony Field was served with a subpoena in the lobby of the Miami International Airport. Field, a Canadian citizen and resident of the Cayman Islands, was directed to appear before a Florida grand jury investigating possible violations of U.S. tax laws by customers of the Cayman Islands bank where Field was employed.[8] Field was ordered to testify notwithstanding his claim that to do so would put him in breach of Cayman Islands bank secrecy laws.[9] At that time it was not clear that the Cayman Islands had a criminal law providing for the punishment of breach of "bank secrecy". Although section 10 of the Banks & Trust Companies Regulation Law[10] provided that it would be an offense for a person to disclose information relating to the affairs of any customer of a bank,[11] the prevailing view was that the provision was aimed at the Inspector of Banks and his staff and did not cover persons in the position of Mr. Field. The only law that could be relied on with certainty was the English case of *Tournier v. National Provincial and Union Bank of England*[12] which applied in the Cayman Islands. In that case the court held that a person could bring a civil action if a bank disclosed his affairs without consent.[13] The court held that there was a qualified duty to keep the client's affairs confidential unless (a) disclosure was under compulsion of law; or (b) there was a duty to the public to disclose; or (c) the interests of the bank required disclosure; or (d) disclosure was made by the express or implied consent of the customer.[14]

The Cayman Islands Government and the private sector took the view that given the importance to the national interests of the Cayman Islands in preserving the integrity of its financial industry, criminal sanc-

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[6] The Confidential Relationships (Preservation) Law (Law 16 of 1976), Suppt. 4 CAYMAN ISLANDS GAZETTE No. 20 of 1976 [hereinafter Confidential Relationships (Preservation) Law].

[7] *See* United States v. Payner, 447 U.S. 727 (1980).

[8] *In Re* Grand Jury Proceeding (Field), 532 F. 2d. 404, (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

[9] *Id.*

[10] Bank and Trust Companies Regulation Law, 1966 (Law 8 of 1966), Cayman Islands.

[11] *Id.*

[12] 1924 I K.B. 461, 1923 All E.R. 550.

[13] *Tournier*, 1923 All E.R. at 556.

[14] *Id.* at 554.

tions similar to those in Switzerland should be introduced to protect bank secrecy.[15] The Confidential Relationships (Preservation) Law was enacted with the purpose of rendering the trading in and misuse of confidential information a criminal offense.[16]

Under the provisions of the Confidential Relationships (Preservation) Law whoever:

> (a) being in possession of confidential information however obtained (i) divulges it or (ii) attempts, offers or threatens to divulge it to any person not entitled to possession thereof
>
> (b) wilfully obtains or attempts to obtain confidential information to which he is not entitled
>
> Shall be guilty of an offense and subject to a fine and imprisonment.[17]

At the time of the coming into force of The Confidential Relationships (Preservation) Law, Financial Secretary Vassel Johnson said:

> Concern was expressed during 1976 by the financial community over a case in which a Cayman-based offshore banking institution was the subject of an inquiry by a foreign government. This arose from a continuing investigation into tax haven operations by large metropolitan countries. These countries are concerned that their tax laws may be breached by citizens who use tax haven facilities. From our point of view, the financial industry is a prominent part of the local economy and we must therefore continue to welcome any investor who chooses to do business in the Cayman Islands. Those who are conducting offshore business must ensure that their activities abroad do not infringe regulations of other jurisdictions. It should be made clear that a tax offense in other countries is not an offense in the Cayman Islands. Under the Confidential Relationships (Preservation) Law recently enacted, no information relating to a customer or client account with any institution within the local financial community can be divulged to anyone. If a foreign government is investigating a case relating to a crime other than a tax offense, and the Government of the Cayman Islands is requested to assist in providing relevant information, the law provides that application for such information be made through the local police to the governor in Executive Council. Such request would be examined if the purported offense would, if committed in the Cayman Islands be an offense under Cayman statutes.[18]

In 1979, the Confidential Relationships (Preservation) Law was

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15 PAGET-BROWN, *supra* note 1, at 142.

16 The Confidential Relationships (Preservation) Law, *supra* note 6.

17 *Id.* § 4.

18 PAGET-BROWN, *supra* note 1, at 142.

amended.[19] The new provisions specify that any person who intends or is required to give evidence of confidential information shall, prior to giving evidence, apply for directions to a judge of the Grand Court.[20] The application before the Grand Court is heard while the judge is sitting alone and, at the judge's discretion, in camera to preserve confidentiality. Upon hearing such application the judge shall direct:

(a) that the evidence be given; or

(b) that the evidence shall not be given; or

(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguarded.[21]

It was the intention of the Cayman Islands Government to ensure that foreign authorities did not invade the sovereignty of the Cayman Islands in an attempt to enforce their own revenue laws. Furthermore, it was designed to protect people who found themselves in the position of Mr. Field. The Cayman Islands Government was aware of the U.S. Supreme Court decision in *Societe International v. Rogers*[22] regarding the production of documents from Switzerland:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.[23]

The Cayman Islands confidentiality law was immediately attacked by American politicians and law enforcement officials who took the view that:

> [s]ecret foreign bank accounts and secret foreign financial institutions have permitted proliferation of "white collar" crime; have served as the financial underpinning of organized criminal operations in the United States; have been used by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations concerning securities and exchanges; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable acquisitions, mergers and takeovers; have covered conspiracies to steal from U.S. defense and foreign aid funds; and have served as the cleansing agent for "hot" or illegally obtained monies.[24]

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19 The Confidential Relationships (Preservation) (Amendment) Law 1979 (Law 26 of 1979), 21 CAYMAN ISLANDS GAZETTE 1979.

20 *Id.* § 3A(4)(ii).

21 *Id.* § 3A(3).

22 357 U.S. 197 (1958).

23 *Id.* at 197.

24 H.R. REP. NO. 91-975, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4397.

It was not in the interests of the Cayman Islands to be seen as a haven to the criminal. If the offense being investigated by the United States was recognized as an offense under Cayman Islands law, then every assistance necessary would be provided. The provisions of the Confidential Relationships (Preservation) Law have no application to the seeking, divulging or obtaining of confidential information by a senior Cayman Islands police officer investigating an offense committed or alleged to have been committed within the Cayman Islands. In addition, the provisions do not apply to that officer, who is authorized by the Governor to investigate an offense alleged to have been committed in a foreign territory provided it would be an offense if committed in the Cayman Islands.[25] The Cayman Islands wanted to cooperate, but only according to Cayman Islands laws. Since the Cayman Islands is tax free, an investigation into a tax offense would not receive the cooperation of the Cayman Islands authorities.

With the Confidential Relationships (Preservation) Law, the Cayman Islands rose from the ranks of those common law countries, such as England and the United States, which merely provide for civil remedies as between customer and bank in "bank secrecy" cases.[26] The Cayman Islands joined the ranks of civil law countries, such as Switzerland and Luxembourg, which make breach of bank secrecy a criminal offense.[27]

The Swiss made violations of bank secrecy a criminal offense in 1934, largely to prevent Nazi agents from tracing assets deposited by German Jews.[28] Bank secrecy, however, appears to have been developed before Roman times when temples acted as banks.[29] Bank secrecy then made its way into the Civil Codes and into the custom law of merchants.[30] In 1765 King Frederick the Great of Prussia protected bank secrecy as a crime when he ordered:

> We forbid, at Our Royal Disgrace, all and everybody to search into what should stand in the folio to the credit of another person, and none of the bank clerks shall dare to disclose such, whether by words, signs, or in writing, or suffer loss of their employment and the penalty expecting a perjurer. . . .[31]

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25 The Confidential Relationships (Preservation) Law, *supra* note 6, § 3 (iii).

26 *See, e.g., Tournier*, 1923 All E.R. 550 (England); Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961) (United States).

27 *See, e.g.*, Art. 47 Swiss Federal Law on Banks and Savings Organizations (Switzerland); Art. 16 Law on Credit Institutions of Apr. 23, 1981 (Luxembourg).

28 Schellenberg, *Bank Secrecy*, 7 INT'L BUS. LAW. 221, (1979); Meier, *Bank Secrecy in Swiss And International Taxation*, 7 INT'L LAW. 16, 17-20 (1973); Aubert, *Swiss Bank Secrecy, Its Legal Basis and Limits Under Domestic And International Law*, 4 TAX PLANNING INT'L 5 (Jan. 1977).

29 Meier, *supra* note 28, at 16.

30 Neate, *Bank Secrecy*, 7 INT'L BUS. LAW. 263 (1979).

31 Schneider, *Bank Secrecy*, 7 INT'L BUS. LAW. 230 (1979).

As is the case in other countries which make breach of bank secrecy a criminal offense, the Cayman Islands is a country of limited natural resources, dependent on the area of tourism, finance and banking. It is perfectly natural that the Cayman Islands should protect its well being in the same way that other countries, including the United States, protect their economies.

The attitude of the Cayman Islands Government was similar to that expressed by the Chief Justice of the Bahamas who said in *In Re Nassau Bank and Trust Company*:[32]

> [O]ver and over, in public and in private, locally and abroad, Bahamian public officials and foreign and local financial advisers, have constantly proclaimed that accounts in Bahamian banks and trust companies are legally protected from the prying eyes of others both within and without the Commonwealth of the Bahamas. . . . The secrecy provision is one of the pillars of this part of our economic structure, the destruction of which would lead to the collapse of the whole structure it supports.[33]

The Cayman Islands Government followed the position taken by the United Kingdom government when faced with investigations by U.S. authorities. In *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*[34] Lord Wilberforce said:

> The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive . . . . they have, as I have stated, no difficulty in doing so.[35]

By enacting the Confidential Relationships (Preservation) Law the Cayman Islands Government ensured that information would only be disclosed when such disclosure was in the public interest of the Cayman Islands. The "bank secrecy" law is similar to "blocking statutes," such as the French Penal Code Law No. 80-538.[36] The United Kingdom Pro-

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32 1985 CILR 418.

33 *Id.*

34 1978 1 All E.R. 434, AC 547.

35 *Id.* at 448.

36 *See* Societe Nationale v. United States, 107 S. Ct. 2542 (1987). Article 1A of the French Penal Code Law No. 80-538 provides:

> Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek, or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith. . . .

tection of Trading Interests Act 1980[37] provides that the British government can prohibit a person in the United Kingdom from giving evidence in connection with foreign proceedings when it is satisfied that the jurisdiction and sovereignty of the United Kingdom has been prejudiced. Other countries have also introduced statutes imposing criminal penalties to deter any act which would have a detrimental effect on their economies.[38]

Public interest is the foundation upon which confidentiality, including bank secrecy laws, rests. It is therefore in the area where two states have jurisdiction to proscribe and enforce rules of law that conflicts arise. The courts of each country consider first and foremost the public interest of their own nation when balancing the interests of a foreign sovereign.

Crimes used to be altogether local, recognizable and punishable exclusively in the country where they were committed. Chief Justice Marshall, the first U.S. Supreme Court Chief Justice, said "No country executes the penal laws of another."[39] It has always been a principle of international law that an act of sovereignty can have no effect in the territory of another state. Today, however, criminals operate internationally to avoid detection. The Cayman Islands Government recognized that the same strict confidentiality law which provided security to bona fide business might also attract criminal elements attempting to hide their ill-gotten gains. The then Governor of the Cayman Islands, Peter Lloyd, stated the matter clearly when he addressed the Cayman Islands Bankers Association in July 1982:

> [T]he private sector must play its part too to maintain the standing and reputation of the Cayman Islands' financial industry .... any offshore tax haven with a very strict confidentiality law may be abused by people seeking a repository for dirty money whether this be the proceeds of fraud, or theft or of the narcotics trade. . . . Banks and others in the private sector must bear the main responsibility for the necessary vigilance for insuring, by self-regulation, that our financial industry is clean.[40]

The Confidential Relationships (Preservation) Law did not mean

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Id.

37 Protection of Trading Interests Act, 1980 (c. 1i).

38 Australia: Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; Canada (Ontario): Business Records Protection Act 1947; Canada (Quebec): Business Concerns Records Act 1964; Federal Republic of Germany: Law on Federal Duties in Matters Concerning Shipping, 24 May 1965; Italy: Shipping Documents Act 1980; South Africa: Protection of Business Act 1978; Sweden: Ordinance Regarding the Prohibition in Certain Cases for Shipowners to Produce Documents Concerning the Swedish Shipping Industry, 13 May 1966.

39 *In Re Nassau Bank* 1985 CILR 418; A.V. DICEY & J.H.C. MORRIS, THE CONFLICT OF LAWS 77 (9th ed. 1973).

40 Address by His Excellency Mr. G. Peter Lloyd, Governor of the Cayman Islands, Cayman Islands Bankers Association, *as reported in* the Daily Caymanian Compass, July 8, 1982, at 1.

that the Cayman Islands refused all cooperation in the international fight against crime. The Cayman Islands law provided the same procedures as is common among nations where international comity exists. Under the Hague Convention on Evidence, assisting foreign courts in the taking of evidence in both civil or commercial matters is mandated.[41] By statutory instrument, Her Majesty's Government extended to the Cayman Islands the provisions of the United Kingdom's Evidence (Proceedings in Other Jurisdictions) Act 1975,[42] giving effect to the relevant Hague Convention and empowering the Grand Court of the Cayman Islands to exercise jurisdiction to grant requests for international judicial assistance.[43] The Cayman Islands Chief Justice Sir John Summerfield Q.C. said in *United States of America v. Carver*:[44]

> It is the duty and the pleasure of the Court . . . to do all it can to assist the foreign court just as the Court . . . would expect the foreign court to help it in like circumstances. . . . As a matter of jurisdiction, in the ordinary way and in the absence of evidence to the contrary . . . the Court should be prepared to accept the statement of a foreign court in its request that the evidence is required . . . for the purposes of civil and criminal proceedings. On the other hand, the form of the letter of request is not conclusive; the Court must examine the request objectively by the nature of the testimony sought, and it has to look at the substance of the matter . . . the Court has power to accept or reject the foreign request in whole or in part, whether as to oral or documentary evidence and it can and should delete from the foreign request any parts that are excessive either as regards witnesses or as regards documents. . . . This Court must also take into account the Confidential Relationships (Preservation) Law and its purpose. While this country holds itself out as a tax haven, it does not aim to become a haven for illicit spoils. In particular, this Court will give all the assistance the law allows in bringing criminals to justice who are guilty of fraud or theft. But it must also insist that a proper case be made out for the release of protected information where the law allows such release. Further, the Court will not allow process under the Order as a means of invading sovereignty.[45]

The intention of the Cayman Islands Government was that the United States should follow the procedures of the Hague Convention

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[41] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444.

[42] Statutory Instrument No. 1890 of 1978 entitled The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 whereby Her Majesty in Council extended to the Cayman Islands the provisions of the U.K.'s Evidence (Proceedings in Other Jurisdictions) Act 1975 (c. 34) giving statutory force to the Hague Convention.

[43] Evidence (Proceedings in Other Jurisdictions) Act 1975 (c. 34).

[44] Unreported Cayman Islands case in relation to United States v. Carver, 671 F.2d 577 (D.C. Cir. 1982) (heard on June 4, 1982).

[45] *Id.*

when seeking evidence in the Cayman Islands. This was the case in *Ings v. Furgeson*,[46] where subpoenas *duces tecum* were served on the New York agencies of The Bank of Nova Scotia and The Toronto Dominion Bank.[47] The Second Circuit Court of Appeals held that since the Law of Quebec prohibited the banks and their employees from sending outside the Province any of the documents demanded, the subpoenas should be quashed because the proper procedure would be to comply with the statutes enacted under the Hague Convention.[48] The Court said:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and best resolved by the Canadian courts.[49]

The Hague Convention is currently in force between the United States and Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden and the United Kingdom (including the Cayman Islands).[50]

The U.S. law enforcement authorities, however, decided that the existing international structure of cooperation was unsatisfactory for its purposes. Their problem was two-fold. In the first place, the taking of evidence abroad under the Hague Convention applies only to courts and not to the seeking of evidence by U.S. grand juries.[51] In the second place, the United States complained about the expense:

> [W]e do not view this costly, time consuming method to offer a viable, long term solution to the problem of obtaining foreign bank records. This is wholly unsatisfactory and altogether too expensive. It is the position of the Department of Justice that the foreign government should represent the U.S. in its requests for information in foreign courts. . . .[52]

The position of the United States is that the Hague Convention is not the exclusive method by which evidence located in a foreign country

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[46] 282 F. 2d 149 (2d Cir. 1960).

[47] *Id.*

[48] *Id.* at 152.

[49] *Id.*

[50] *See Societe Nationale*, 107 S. Ct. at 2545.

[51] *See* Rio Tonto Zinc v. Westinghouse 1978 1 All E.R. 434 at 451 (House of Lords decision, Viscownt Dilhorne's opinion).

[52] D. Lowell Jenson, Asst. Atty. Gen., Criminal Division U.S. Dept. of Justice. Evidence Before the Senate Permanent Subcommittee on Investigations Concerning Law Enforcement Problems Arising from Foreign Bank Secrecy Laws and Proposed Remedies, Mar. 15, 1983, at 218.

can be obtained.[53] The use of a subpoena may be more desirable. It has been reported that the attitude of the Justice Department in its quests to obtain evidence located abroad has caused friction between the Justice Department and the State Department.[54] The Washington Post reported:

> In one case after another, the Justice Department has become an aggressive player on the international stage, a role that has produced a growing degree of friction with Secretary of State George P. Schultz and his senior staff.
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> Such conflicts are inevitable between departments with different mandates—one tightly focused on law enforcement, the other with broad concerns about U.S. relations world wide. . . . 'We've had some real wrestling matches, no question about it . . . . some differences in approach. Where you get the charge that we're selling out to maintain good relations is from the U.S. attorneys who are not familiar with international procedures . . . demands for evidence abroad create a foreign policy conflict . . . you have to do a bit of negotiating with the other country to get what you want.' One such battle occurred two years ago when Justice Department investigators demanded the records of a Canadian bank with a branch in a Caribbean tax haven. The Canadian prime minister complained to [President] Reagan about the subpoena and the State Department officials accompanied Canadian diplomats to a tense meeting at the Justice Department. . . . Sources said then Attorney General William French Smith refused to back off, saying drug traffickers frequently hide money in offshore tax havens and the Justice would not be thwarted by foreign bank secrecy laws. The Justice Department eventually won access to the bank records leading to the conviction of a Florida businessman for tax evasion. . . .[55]

By using the subpoena power against foreign banks, the United States caused the banks to be subject to conflicting laws. Doubtless, the United States has jurisdiction over its citizens both within and without the United States. It also has jurisdiction over all persons who purposefully avail themselves of the privilege of conducting activities within the United States and thereby invoke the benefits and protection of its laws. For example, *In re Grand Jury 81-2*,[56] a grand jury sitting in the Western District of Michigan, called for the production of customer bank records held by the Deutsche Bank, AG in Germany.[57] The subpoenas were served on the bank's New York agency.[58] The bank had been ordered by

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[53] *Societe Nationale*, 107 S. Ct. at 2542.

[54] *Global Role of Justice Dept. is Irritant at State*, Wash. Post, Nov. 12, 1986, at *A*1, col. 1.

[55] *Id.*

[56] 550 F. Supp. 24 (W.D. Mich. 1982).

[57] *Id.* at 25.

[58] *Id.*

the German authorities not to comply with the request. The court said:

> It is clear that if the Deutsche Bank AG were not doing business in the United States, this court would have no jurisdiction to order compliance by the bank with these subpoenas . . ., [h]owever, the maintenance by Deutsche Bank AG of an active branch office in New York provides sufficient evidence that the bank "purposefully avails itself of the privilege of conducting activities within the (United States) . . . , thus invoking the benefits and protection of its laws. . . In short, the bank's argument that the records in Germany are beyond the jurisdictional reach of these subpoenas and the orders of this court ignores the continuous and systematic presence of the bank in the United States and attempts to dodge the obligations that presence imposes on the bank with respect to American law. It is not the agent of the bank to whom the grand jury addressed its subpoenas, but the bank itself and that bank is found operating in the United States. . .[59]

The fifth amendment of the U.S. Constitution provides that "no person shall be required to answer for a capital or other infamous crime unless presented with a grand jury indictment".[60] Grand juries are arms of the courts and are designed to hear evidence presented to it by a prosecutor concerning offenses arising in the jurisdiction in which they sit. If a grand jury determines that it would like to hear witnesses or evidence not presented to them by the prosecutor, it has the power to subpoena witnesses or documents either directly or through the prosecutor.[61] The U.S. courts are reluctant to countenance any device which puts relevant information beyond the reach of an impaneled grand jury or impede or delay its proceeding. Judge Learned Hand put the issue in perspective many years ago when he said:

> the suppression of truth is a grievous necessity at best more especially where as here the inquiry concerns the public interest. It can be justified at all only where the opposing private interest is supreme.[62]

No area in international legal affairs has, in my opinion, caused more tension between governments than this investigative power of United States grand juries. For many years now the United States has sought to exercise jurisdiction over foreigners with respect to acts outside the jurisdiction of that country.

The frequently cited reference in case law involving the enforcement of a subpoena outside the United States is the Restatement (Second) For-

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[59] *Id.* at 27.

[60] U.S. CONST. amend. V.

[61] *See* Hemmings v. Coleman, 187 So. 793 (Fla. 1939).

[62] McMann v. S.E.C., 87 F.2d 377 (2d Cir.), *cert. denied*, McMann v. Engle, 301 U.S. 684 (1937).

eign Relations Law of the United States.[63] Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
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> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as:
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place within the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The most recent draft of Restatement (Revised) section 437 provides:

> (1)(a) Where authorized by statute or rule of court, a court in the United States may order a person subject to its jurisdiction to produce documents, objects, or other information directly relevant, necessary, and material to an action or investigation, even if the information or the person in possession of the information is outside the United States.
>
> (b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including the finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination by the court that the facts to which the order was addressed are as asserted by the opposing party.
>
> (c) In issuing an order directing production of information located abroad, a court in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.[64]

The case law on this subject has been consistent; while bank secrecy laws will be taken into account, they generally have carried very little

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[63] RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 40 (1965) [hereinafter RESTATEMENT].

[64] RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED) § 437(1)(a)-(1)(c) (Tent. Draft No. 6, Vol. 1, Apr. 1980) [hereinafter RESTATEMENT REVISED].

weight.[65] As stated in *United States v. Davis*:[66]

> The United States has a strong interest in the effective enforcement of its criminal laws. . . . Furthermore the Cayman Bank records were essential to the Government's case. . . . In contrast, while the Cayman Islands has a vital national interest in preserving the privacy of its banking customers, the statute does not provide a blanket guarantee of privacy and has many exceptions. . . . In addition, since American citizens are required to reveal the existence of foreign bank accounts and report certain foreign transactions by American law, Cayman national interests are not impinged upon and to the extent that the subpoenaed records contain information which Davis was required to disclose under American Law. We also note that the Cayman Attorney General, after consultation with the United States Government, agreed to support the Bank's efforts to obtain a Cayman court order authorizing the disclosure of the records. . . . Furthermore, the Cayman Islands has a policy against the use of its business secrecy laws to encourage or foster criminal activities. . . . The court therefore concludes that Cayman has no strong national policy interests which would be affected by disclosure of Davis' bank records.[67]

The U.S. Constitution[68] provides in part that Congress shall have the power to regulate commerce among foreign nations and among the several states. It is this commerce power which the U.S. Supreme Court has acknowledged gives Congress the jurisdiction to enact Federal criminal laws.[69] Congress has the inherent power to establish criminal penalties for actions that interfere with any Federal interest.[70] This authority to regulate interstate and foreign commerce enables Congress to enact criminal laws which not only have force in the United States but also have an extraterritorial effect.[71] For example, the U.S. securities laws provide that a willful violation of the substantive provisions of the securities statutes, or a rule or regulation promulgated under the statutes, will

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65 United States v. First National Bank, 396 F.2d 897 (2d Cir. 1968); *In Re* Grand Jury Proceedings Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1983); Arthur Anderson & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); S.E.C. v. Banca Della Svizzera Italianna, 92 F.R.D. 111 (S.D.N.Y. 1981); *In Re* Marc Rich & Co., A.G., 736 F.2d 864 (2d Cir. 1984); United States v. Chase Manhattan Bank, N.A., 584 F. Supp. 1080 (S.D.N.Y. 1984); *In Re* Grand Jury Proceedings, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940; United States v. Vetco Inc., 644 F.2d 1324 (9th Cir. 1981).

66 767 F.2d 1025 (2d Cir. 1985).

67 *Id.* at 1035.

68 U.S. CONST. art. I, § 8.

69 INTERNATIONAL CRIMINAL LAW, A GUIDE TO U.S. PRACTICE AND PROCEDURE (V. Nanda & M. Bassiouni eds. 1987) [hereinafter INTERNATIONAL CRIMINAL LAW].

70 U.S. CONST. art I, § 8.

71 *Id.*

be a felony.[72] The preservation of fairness in the U.S. capital markets is essential, otherwise there would be two sets of law enforcement rules, one standard for those trading from within the United States and a lesser standard for those trading beyond U.S. borders.

The new offense of laundering monetary instruments under 18 U.S.C. 1956, can operate outside as well as inside the United States.[73] Chemical Bank, the sixth largest commercial bank in the United States, became the first financial institution to be indicted for laundering the money of narcotics dealers.[74] In March 1985, the Permanent Investigations Committee's report on Crime and Bank Secrecy[75] noted that bank secrecy in foreign jurisdictions plays a prominent role in international activity affecting the United States.[76]

The President's Commission on Organized Crime Interim Report: "The Cash Connection: Organized Crime, Financial Institutions and Money Laundering"[77] reported that money laundering is the life blood of organized crime. "The driving force of organized crime is the incentive to earn vast amounts of money, and without the ability to utilize its ill-gotten gains, the Underworld will have been dealt a crippling blow."[78]

An illustration of the extraterritorial effect of U.S. criminal laws is the recent decision in *United States v. Inco Bank & Trust Corp.*,[79] which held that a member of a criminal conspiracy which takes place both in the United States and in a foreign country can be convicted of engaging in the conspiracy even if he performs no overt act within the United States.[80] Inco Bank is a Cayman Islands bank and maintains accounts at several banks in Florida. Inco Bank was charged with conspiring to smuggle money from the United States to the Cayman Islands. U.S. customs laws require any person transporting cash or monetary instruments valued at more than $10,000 into or out of the United States to file a Currency and Monetary Instrument Report disclosing the source and

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72 Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L L. 89 (1984).

73 Laundering of Monetary Instruments, 18 U.S.C. § 1956 (added Oct. 27, 1986, P.L. 99-570, Title I, subtitle H, § 1352 (a), 100 Stat. 3207-18).

74 President's Commission on Organized Crime, Interim Report to the President and the Attorney General, The Cash Connection: Organized Crime, Financial Institutions and Money Laundering, Hearing II Mar. 14, 1984.

75 *Crime and Secrecy: The Use of Offshore Banks and Companies*, S. REP. No. 99-130, 99th Cong., 1st Sess. (1985).

76 Pursuant to Executive Order 12435 and Public Law 98-368.

77 Letter of Irving R. Kaufman, Chairman of President's Commission on Organized Crime submitting Interim Report at 65.

78 *Id.*

79 845 F.2d. 919 (11th Cir. 1988).

80 *Id.*

destination of the money.[81] In order to keep the money laundering operation secret, the conspirators planned to transport the cash outside of the United States without filing the required report. Inco did not dispute that the Government had established the allegations in the indictment, but it argued that the jury should have been instructed to return a verdict of not guilty because the evidence failed to show that Inco Bank had committed any act in furtherance of the conspiracy within the United States.[82] The U.S. Court of Appeals for the Eleventh Circuit held:

> It is well settled that the government has the power to prosecute every member of a conspiracy that takes place in United States territory, even those conspirators who never entered the United States. . . . In this case, the conspiracy began in the United States, and although it spread to the Cayman Islands, the conspiracy continued to function in the United States after Inco Bank joined it. In fact Inco Bank joined the conspiracy knowing that it would continue to operate in United States territory. Clearly the Government has power to prosecute Inco Bank.[83]

The Cayman Islands Government has made a number of efforts to show U.S. authorities that it will work with the United States to ensure that the Cayman Islands is not a haven for criminals. Soon after introducing its "bank secrecy law" it put into effect a "gentlemen's agreement," by an exchange of letters with the U.S. Government,[84] which covered circumstances under which information relating to criminal matters could be made available to the United States outside of the Hague Convention formalities. These procedures showed clearly that it is the intention of the Cayman Islands Government to continue to protect the confidentiality of bona fide transactions, cooperating fully to help prevent the country being used for the commission of criminal offenses other than tax offenses.

The Cayman Islands followed the "gentlemen's agreement" with the Narcotic Drugs (Evidence) (United States of America) Law[85] which was enacted to facilitate the obtaining of evidence required in or for the pur-

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[81] 18 U.S.C.A. § 371 providing "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[82] *Inco Bank*, 845 F.2d at 919, 920.

[83] *Id.*

[84] *See* American Bar Association National Institute, TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS III 1925 (1984) [hereinafter TRANSNATIONAL LITIGATION]; Agreement Concerning Obtaining Evidence From Cayman Islands With Regard to Narcotics Activities [Exchange of Letters], July 3, 1986, United States-United Kingdom, 26 I.L.M. 536 (1987) [hereinafter Mutual Assistance Treaty].

[85] Narcotic Drugs (Evidence) (United States of America) Law (1984) (Law 17 of 1984), 24 I.L.M. 937 (1986) [hereinafter Narcotics Law]. *See* TRANSNATIONAL LITIGATION, *supra* note 84.

pose of investigations and proceedings in the United States. The law provides that upon a request made by the Attorney General of the United States to the Attorney General of the Cayman Islands arising from an investigation into any narcotics activity, the Cayman Islands authorities will assist in obtaining any evidence located in the Cayman Islands.[86] It is expressly provided that the Confidential Relationships (Preservation) Law shall not apply to anyone providing "confidential information" to the authorities in these circumstances.[87]

> The Cayman Islands government, like the United Kingdom government, United States government, Canadian government and the Western European governments, has pledged to stop the human suffering and disaster which result from the use of narcotic drugs in the world. The main method of dealing with drug traffickers is to stop the profits being derived from drugs which may be hidden in offshore countries. . . .[88]

Following the enactment of the Law the Cayman Islands Government has complied with 57 requests for confidential information by U.S. authorities investigating drug offenses.[89] The U.S. Justice Department announced that the law has led to 65 indictments and the forfeiture of $15 million.[90]

The cooperation by the Cayman Islands Government did not prevent the United States from ignoring the Hague Convention, and the "gentlemen's agreement." The authorities continued to use grand jury subpoenas to obtain information required for tax investigations. U.S. courts have made it clear that they will not allow "bank secrecy" statutes to thwart them in their goal of ensuring that all U.S. taxpayers comply with U.S. revenue laws.[91]

In *Garpeg, Ltd. v. United States*[92] the Court said:

> The vital interest of the United States, or any state for that matter, in enforcement of its tax laws is unquestionable. . . . [T]axes are the life blood of government and their prompt and certain availability an imperious need. . . . On the other hand the interest of Hong Kong in maintaining its banking secrecy doctrine, a commercial concern, does not directly involve an express statutory concern vital to the govern-

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[86] Narcotics Law, *supra* note 85.

[87] *Id.* § 9.

[88] Government Information Services Release, The Hon. Thomas Jefferson, Financial Secretary of the Cayman Islands, (Aug. 9, 1984).

[89] Caymanian Compass, July 22, 1988, p. 2, col. 3 (Richard Ground Q.C. the Attorney General of the Cayman Islands said: "most of the requests were made at the beginning of the initial period. We have had very few requests in recent months.").

[90] 13 NAT'L L. J. 47 (Nov. 1986).

[91] United States v. Chase Manhattan Bank, N.A., 584 F. Supp. 1080 (S.D.N.Y. 1984).

[92] 583 F. Supp. 789 (S.D.N.Y. 1984).

> ment itself. . . . I find that the interest of the United States in enforcing its tax laws significantly outweighs Hong Kong's interest in preserving bank secrecy.[93]

In *In Re Grand Jury 83-84 [F1]*, Ian Falconer, a Cayman Islands lawyer, was served with a subpoena while on a cricket tour in the United States.[94] Evidence was introduced to show that neither Falconer nor his firm had an office in the United States and that he was only an intermediary and not a target of the investigation. U.S. authorities provided no help to Falconer when he requested their assistance in making an application to the Grand Court under the Confidential Relationships (Preservation) Law which would then allow him to give evidence.[95] All the Americans would say was that the information was needed for a tax fraud case, and Falconer was held in contempt when he refused to testify without the permission of the Grand Court.[96]

On February 28, 1984, the U.S. District Court for the Southern District of Florida filed an order imposing a $1.825 million fine on the Bank of Nova Scotia for failure to comply with a grand jury subpoena duces tecum calling for the production of documents located in the Cayman Islands.[97] The order was filed notwithstanding that the governments of the Cayman Islands and the United Kingdom and the Canadian Bankers Association joined the Bank in its application to have the subpoena quashed.[98] The Bank of Nova Scotia had been enjoined by the Grand Court of the Cayman Islands from obeying the subpoena and the Bank was forced to choose between two conflicting court orders.[99]

The most recent example of international banks being subject to conflicting law is shown by the recent U.S. Supreme Court decision in *Doe v. United States*.[100] Doe had appeared before a Federal grand jury in

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93 *Id.*

94 INTERNATIONAL CRIMINAL LAW, *supra* note 69, at 313 (1987).

95 The Confidential Relationships (Preservation) (Amendment) Law 1979 (Law 26 of 1979).

96 INTERNATIONAL CRIMINAL LAW, *supra* note 69.

97 In the Cayman Islands, Att. Gen. v. BNS, 1985 CILR 418, a U.S. citizen was an authorized signatory in the bank account of a Cayman company. In 1985 the U.S. Court of Appeals for the Fifth Circuit ordered him to sign a "consent directive" to authorize the Bank to make disclosure to U.S. authorities. The learned Chief Justice of the Cayman Islands held:

> A "consent directive" given under compulsion, with the threat of contempt proceedings and fines and/or imprisonment in the event of refusal, is merely submission to force and is not consent for the purposes of (The Confidential Relationships (Preservation) Law 1976 (as amended)). Section 3(2)(b)(i) which requires consent to be given voluntarily. Consent to disclosure, in my view means voluntarily agreeing to disclose . . . I am giving a construction to the word "consent" in that provision that I believe the legislature intended—its ordinary, natural meaning.

Id. at 426.

98 *In re* ABC Limited, 1984 CILR 130.

99 *Id.*

100 108 S. Ct. 2341(1988)(decided June 22, 1988).

Texas pursuant to a subpoena that directed him to produce records of transactions in accounts at three named banks in the Cayman Islands and Bermuda. The U.S. branches of the three banks were also served with subpoenas commanding them to produce records of accounts over which Doe had signatory authority.[101] The banks refused to comply citing their governments' bank secrecy laws. The Cayman Islands bank relied on the Confidential Relationships (Preservation) Law as amended.[102] The Bermuda bank relied on Bermuda common law pursuant to which "no Bermuda bank may release information in its possession concerning its customer's affairs unless (1) it is ordered to do so by a court of competent jurisdiction in Bermuda, or (2) it receives a specific written direct from its customer requesting the bank to release such information."[103]

The Supreme Court noted that the U.S. Government had not yet sought contempt sanctions against the banks. Doe refused to sign twelve forms consenting to disclosure of bank records. He was held in civil contempt and ordered confined until he complied with the order. Justice Blackmun delivered the opinion of the Court.[104]

> The Petitioner's sole claim is that his execution of the consent forms directing the banks to release records as to which banks believe he has the right of withdrawal has independent testimonial significance that will incriminate him, and that the Fifth Amendment prohibits governmental compulsion of that act.
>
> The question on which this case turns is whether the act of executing the form is a "testimonial communication." . . .[105]

The Supreme Court held that the consent directive itself was not testimonial, Doe's compelled act of executing the form had no testimonial significance, and that his execution of the forms did not admit or assert his consent. The Court said:

> The form does not state that Doe "consents" to the release of the bank records. Instead, it states that the directive "shall be construed as consent" with respect to Cayman Islands and Bermuda bank-secrecy laws. . . . When forwarded to the bank along with the subpoena, the executed directive, if effective under local law, will simply make it possible for the recipient bank to comply with the Government's request to produce such records.[106]

The Supreme Court noted:

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101 *Id.* at 2344.

102 *Id.* at 2343-44.

103 *Id.* at 2343-44 and 2343 n.1.

104 *Id.* at 2345.

105 *Id.* at 2346, 2349.

106 *Id.* at 2349.

> The effectiveness of the directive under foreign law has no bearing on the constitutional issue of this case. Nevertheless, we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation. We are not called upon to address those questions here.[107]

The Cayman Islands Government had filed a brief as *amicus curiae* bringing to the courts attention that a consent directive signed pursuant to an order of a U.S. court and at the risk of contempt sanctions could not constitute consent under the Cayman Islands confidentiality law.[108] In *In re ABC, Ltd.*[109] Chief Justice Summerfield wrote:

> Although in form the consent directive purports to be a consent and direction given by the client of the bank it is in substance a direction given by the foreign court. It is not real consent at all. . . . In effect the foreign court is usurping the power to order disclosure and, in doing so, completely by-passing the [section] 3A procedure under that Law. . . . In short, consent given under compulsion is merely submission to force. . . .[110]

The Supreme Court noted that the U.S. Justice Department had observed that the decision in *In Re ABC, Ltd.*[111] had not been appealed and argued accordingly that Cayman law on the point had not been definitely settled.[112] That is, in the writer's opinion, a strange submission to make, or indeed to be persuaded by. Surely the rule is that in the absence of appeal or conflicting authority the decision of *In Re ABC, Ltd.* does represent the settled law of the land. Apparently it was not brought to the attention of the Supreme Court that, in the year following the decision of *In re ABC, Ltd.* Chief Justice Summerfield said in *Att. Gen. v. BNS*:[113]

> [T]his Court has already expressed its views in *In re ABC, Ltd.* . . . I find no reason to [retreat] from the views and conclusions expressed in that case. I adopt them for the purpose of this application and adhere to the view that purported consent reflected in such a "consent directive" given under compulsion, with threat of contempt proceedings and fines and/or imprisonment in the event of refusal, is merely submission to force and is not consent for the purpose of [section] 3(2)(b)(i) which requires consent to be given voluntarily.[114]

The learned Chief Justice of the Cayman Islands observed that the

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107 *Id.* at 2366.
108 *Id.* at 2369.
109 *See id.* at 2351 n.16.
110 1984 CILR 130.
111 *Id.*
112 *Id.* at 134.
113 *Doe*, 108 S. Ct. 2341 at 2369.
114 1985 CILR 418.

"consent directive" of the U.S. court was an infringement of Cayman Islands sovereignty.[115] He noted that English Courts were very sensitive to orders which might be seen as an infringement of sovereignty of U.S. courts. This principle was illustrated in *MacKinnon v Donaldson Lufkin Corp.*[116] when Justice Hoffman set aside a subpoena served on the London branch of Citibank, New York in respect to an English action saying:

> The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement on a foreigner, and in particular, on a foreign bank.... If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure. I have stated the principle as being a self-imposed limitation on a state's sovereign authority.[117]

From the above, it will be seen that a better way has to be found to ensure cooperation between the United States and the Cayman Islands rather than confrontation. The legitimate interests of the United States must be respected, while at the same time ensuring that the sovereignty and public interest of the Cayman Islands is protected.

Fortunately, an understanding had been reached by the governments of the Cayman Islands and the United States that if the Narcotics Agreement worked satisfactorily the Cayman Islands Government would negotiate a wider enforcement treaty to cover crimes other than narcotics offenses. Thus on July 3, 1986, the Treaty relating to the Mutual Assistance in Criminal Matters[118] was executed by representatives of the Cayman Islands, United Kingdom and United States governments.

> The treaty sets the stage for the future economic well being of the country, which will preserve the offshore financial center intact and give the [United States] nothing but the right to pursue their criminals in our country and according to our laws.[119]

The Cayman Islands legislature gave effect to the terms of the Treaty by the enactment of the Mutual Legal Assistance (United States

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[115] *Id.* at 426.

[116] *Id.* at 431.

[117] 1986 1 All E.R. 653.

[118] *Id.* at 658.

[119] Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, United States-United Kingdom, 26 I.L.M. 536 (1987) [hereinafter Legal Assistance Treaty].

of America) Law.[120] The Treaty was transmitted by President Reagan to the Senate with a view to receiving its advice and consent on August 4, 1987, and awaits ratification. This 1986 Treaty provides for a broad range of cooperation in criminal matters. Mutual assistance available under the Treaty includes: (1) executing requests relating to criminal matters by undertaking diligent efforts, including the necessary administrative or judicial action such as the issuance of subpoenas and the execution of search warrants;[121] (2) taking of testimony or statements of persons by noncompulsory or compulsory measures;[122] (3) effecting the production, preservation, and authentication of documents, records or articles of evidence;[123] (4) providing assistance in proceedings for forfeiture or restitution of proceeds of an offense or for imposing fines;[124] (5) serving judicial documents, writs, summonses, records of judicial verdicts, and court judgments and decisions;[125] (6) effecting the appearance of a witness before a court;[126] (7) locating persons[127] and (8) providing judicial records, evidence, and information.[128]

The Treaty, unlike the Hague Convention, permits mutual assistance at the investigative stage and in grand jury proceedings, thus addressing U.S. concerns.[129] The offenses covered by the Treaty are those punishable by more than one year's imprisonment in both countries, and the crimes of: racketeering, drug trafficking, failing to report transfer of illegally acquired money, failing to report the transfers of illegally acquired funds, insider security practices,[130] and violations of the Foreign Corrupt Practices Act.[131]

It is most important to note that the Treaty permits the denial of assistance in matters relating directly to the regulation of taxes unless the offenses are related to narcotics trafficking, or fraudulent promotion of tax shelters, or certain other offenses in connection with illegally obtained income.[132] The Chief Justice of the Cayman Islands, or a judge acting on his behalf, may refuse a request from the U.S. Attorney General if it is in the "public interest" of the Cayman Islands to do so, and

120 Debate on the Treaty in the Cayman Islands Legislative Assembly, Sept. 4, 1986, The Hon. Vassell Johnson C.B.E., J.P. Member of Executive Council.

121 Legal Assistance Treaty, *supra* note 119, art. 5(1).

122 *Id.* art. 8(1), 14(1).

123 *Id.* art. 8(1), art. 10(1).

124 *Id.* art. 8(1), 8(5).

125 *Id.* art. 16(2).

126 *Id.* art. 13(1).

127 *Id.* art. 10.

128 *Id.* art. 12(1).

129 *Id.* art. 1(1).

130 *Id.* art. 19(3).

131 *Id.* art. 19(3)(i).

132 *Id.* art. 19(3)(e).

where the request does not establish "reasonable ground" for believing that the specified offense has been committed.[133]

The Confidential Relationships (Preservation) Law does not apply to any person required to give evidence or produce documents before the Chief Justice of the Cayman Islands in the exercise of his administrative authority under the Treaty.[134] Very significantly, however, article 17(3) of the Treaty precludes the United States from enforcing any compulsory measure, including a grand jury subpoena for the production of documents located in the Cayman Islands, unless the formalities of the Treaty have first been observed. This clause addresses the particular British and Cayman Islands concern with respect to bank secrecy by providing that unilateral compulsory measures for the production of documents shall not be enforced in the first instance.[135]

It appears that the Cayman Islands Government has been able to reach an accord with the United States which will avoid the confrontation that unilateral acts of the United States have caused. The Cayman Islands Government has accomplished the legitimate goal of protecting "bank secrecy" and the integrity of its financial industry. Mutual assistance treaties have been concluded between the United States and Italy, the Netherlands, Switzerland and Turkey, and have been signed with Canada, Columbia, Morocco, Thailand, and the Bahamas.[136]

> The U.S. treaties on mutual assistance in criminal matters represent a step forward in international relations in that they offer rules and procedures that greatly simplify previous practices and offer an alternative to questionable techniques such as the kidnapping of information in foreign countries and attempting to enforce U.S. subpoenas in foreign jurisdiction.[137]

To date, it has been reported that the treaties with Switzerland and the Netherlands have worked to the mutual satisfaction of the countries concerned.[138] The U.S. Justice Department received approximately 120 requests from the Swiss for assistance and made about 250 requests themselves.[139] The Justice Department has received approximately 20 requests from the Netherlands and made approximately 10 requests to the Netherlands since the coming into force of that treaty.[140] It is there-

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133 The Mutual Legal Assistance (United States of America) Law 1986 (Law of 1986) Suppt. No. 1 Gazette No. 23 of 1986.

134 *Id.* § 11.

135 Letter of Submittal Department of State to the President, July 23, 1987, p. XI.

136 INTERNATIONAL CRIMINAL LAW, *supra* note 69, at 236.

137 Ellis and Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189, 222 (1985).

138 INTERNATIONAL CRIMINAL LAW, *supra* note 69, at 268.

139 *Id.*

140 *Id.*

fore sincerely hoped that the treaty with the Cayman Islands will likewise fulfill the desire of the people of the Cayman Islands. These desires were reflected by the statement of His Excellency Mr. G. Peter Lloyd, the Governor of the Cayman Islands, when he hailed the Treaty as a move which would "help provide a solid foundation for the further development of the territory's financial industry."[141] The interests of the United States in fighting white collar crime have been advanced and the integrity and reputation of the Cayman Islands have been enhanced.

141 Cayman Compass, July 4, 1986.